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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK EARL HORNE, JR.,

Defendant and Appellant.

B284339

Los Angeles County
Super. Ct. No. TA137747

APPEAL from an order of the Superior Court of
Los Angeles County, Kelvin D. Filer, Judge. Conviction affirmed;
remanded with directions.

Julie Caleca, under appointment by the Court of Appeal,
for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Scott A. Taryle and Nancy Lii Ladner,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Frank Earl Horne, Jr.,¹ of attempted voluntary manslaughter, assault with a semiautomatic firearm, shooting at an occupied motor vehicle, possessing a firearm with a felony conviction, and carrying a loaded firearm with a prior conviction. The jury found true firearm enhancements as well as the allegation that Horne personally inflicted great bodily injury on the victim. The trial court sentenced Horne to 19 years in the state prison.

Horne's sole contention on appeal initially was that the trial court should have stayed his punishment for shooting at an occupied motor vehicle under Penal Code section 654.² We disagree and therefore affirm. However, we remand the case with directions to the trial court to strike the firearm enhancement on that count. The People concede the enhancement must be stricken because use of a firearm is an element of the offense.

In three rounds of supplemental briefing, Horne also contends (1) we should remand the case for the trial court to exercise its discretion to strike the firearm enhancement under Senate Bill No. 620; (2) he is entitled to a limited remand for evaluation for pretrial mental health diversion under sections 1001.35 and 1001.36; and (3) his restitution fine must be stayed, and court fees stricken, under *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We agree with Horne's first contention and disagree with his second and third.

¹ Much of the record, as well as the briefs, misspell Horne's name as "Horn." The correct spelling is "Horne."

² Statutory references are to the Penal Code unless otherwise noted.

FACTS AND PROCEDURAL BACKGROUND

1. *Horne holds his gun to the victim's head, then shoots him*

In July of 2015 Larry Taylor was working as a truck driver. Horne worked for the same company. Truck drivers chose trucks on a first come, first served basis. On the morning of July 17, Taylor got to the lot around 4:50 a.m. He chose a truck and began to prepare it for the day. This “semi pretrip” included inspecting the truck and tires and looking under the engine. Taylor moved the truck to the front of the lot and went back to his car to get his bag and lunch. He was “talking to a couple of guys at the job” and then Horne walked by.

Horne said, “Where’s the key to my truck?” Taylor and the other men looked at each other; they didn’t know what Horne was talking about because “at the job it’s first come first serve[d].” “The truck you get, that’s the truck you drive.” Horne said, “The one in the front.” Another man told Taylor, “He talking about the truck you got.”

Taylor tried to reason with Horne. Taylor told him, “We can talk about this, man. Come on. You know I drive this truck all the time.” Taylor was walking toward the truck to put his belongings in it. Horne got to the truck first, opened the door, and put his bag in.

When Taylor was about 10 feet from the truck, Horne pulled a gun out of the truck and racked it, putting a bullet in the chamber. Taylor froze. Horne came out from behind the door of the truck, pointed the gun at Taylor, and then put it to Taylor’s head. Taylor gave Horne the key to the truck. Horne told Taylor to drop the belongings he had in his hand and Taylor “dropped everything on the ground.” Horne pushed Taylor’s head with the gun and said, “Get in your car. Get the fuck out of here.”

Taylor told Horne, “Man, it doesn’t have to be like this. You don’t have to do this. You got the key.” Taylor started to back away, his hands lifted “like he was surrendering.” Horne lifted up the gun and fired a round. Taylor began to run. Horne ran after Taylor, firing shots in his direction. Two bullets hit Taylor on the right side of his lower back. He stumbled forward.

Taylor “made it to [his] car” and got in. Horne was standing in front of the car with the gun still pointed at Taylor. Horne moved to the passenger side and fired a bullet through the window. He shot two more bullets into the car: one into the quarter panel and another through the top. Taylor “threw [his car into] gear and just took off.” He called his wife, then 911.

According to a security guard who worked at the truck yard, the entire incident—from when Horne began arguing with Taylor until Taylor drove away—lasted about a minute and a half.

Paramedics took Taylor to the hospital. A trauma surgeon observed two through-and-through gunshot wounds to Taylor’s right torso. The surgeon performed exploratory surgery under general anesthesia. The surgeon confirmed there were no injuries to Taylor’s liver or colon, so she “irrigate[d] [Taylor’s] abdomen and close[d] it.”

At the time of the trial nearly seven months later, Taylor was still in pain “every single day.” He had to “take medication every day just to get through the day.” Taylor had not been able to work since Horne shot him.

2. *The charges and trial*

The People charged Horne with attempted willful, deliberate, premeditated murder (count 1); assault with a semiautomatic firearm (count 2); shooting at an occupied motor vehicle (count 3); possession of a firearm by a felon (count 4); and carrying a loaded firearm with a prior conviction (count 5).

The People alleged firearm enhancements as to each count. The People also alleged—as to counts 1, 2, and 3—that Horne personally inflicted great bodily injury on Taylor.

The case proceeded to trial on January 30, 2017. Horne testified on his own behalf. Horne said he had “a real bad headache” that morning. He thought it was “kind of odd that there was a lot of people there [at the truck yard] walking around doing stuff.” Horne testified that, when Taylor approached him, “it was just out of the corner of my eye, it looked like a body.” Taylor was “walking toward [Horne] and he was reaching for something and [Horne] thought he was reaching for a gun or something.” Horne said he “shot in the air” “just trying to scare him away to leave.” Horne testified he was not trying to shoot or injure Taylor. Horne said Taylor was standing outside his car when Horne “fired near” the car.

On cross-examination, Horne denied ever having spoken to Taylor that morning. Horne admitted he never saw Taylor with a gun. Horne denied having shot Taylor in the back as he ran away; he said, “I was shooting in the air.” Horne testified Taylor’s car window “got shot” but “[t]hat was an accident.” When asked if he was trying to shoot Taylor with the two shots that hit him, Horne answered, “I don’t remember.”

The jury found Horne not guilty of attempted murder but guilty of the lesser crime of attempted voluntary manslaughter. The jury convicted Horne on all four of the remaining counts and found the firearm and infliction of great bodily injury allegations true.

The trial court sentenced Horne to 19 years in the state prison. The court chose count 2—assault with a semiautomatic firearm—as the principal count. The court imposed the upper term of nine years, plus three years for the infliction of great bodily injury, plus the midterm of four years for the personal

use of a firearm. On count 3—shooting at an occupied motor vehicle—the court imposed one year, eight months (one-third the midterm of five years) plus 16 months (one-third the midterm of four years) for the personal use of a firearm, to be served consecutively to count 2.

The court rejected Horne’s contention that the sentence on count 3 should be stayed under section 654. The court stated it “certainly ha[d] considered” the section 654 issue and it “applie[d] to some of the counts.” But, the court continued, “I do think there was a sufficient gap in time between count 2 which was the assault by firearm and count 3 shooting at an occupied vehicle.” After hearing further argument from counsel, the court stated, “As to count 3 the conviction for Penal Code section 246, shooting at an occupied vehicle, again, I do think that there was a sufficient break between the conduct in count[s] 2 and 3. There’s sufficient time for Mr. Horn[e] to reflect on his conduct and whether he should continue to shoot. He made the determination he was going to continue to shoot, actually pursued the victim firing numerous times as well. So the court is going to run the time in count 3 consecutive to the time in count 2.”

On count 1—attempted voluntary manslaughter—the court sentenced Horne to the midterm of three years plus three years for the great bodily injury. On both count 4—possession of a firearm by a felon—and count 5—carrying a loaded firearm with a prior conviction—the court imposed the midterm of two years plus the midterm of four years for the firearm enhancements. The court stayed the sentences under counts 1, 4, and 5 under section 654.

The prosecutor told the court Taylor was not requesting any victim restitution. The court ordered Horne to pay a restitution fine of \$5,000 under section 1202.4, subdivision (b)(1),

a \$200 court operations assessment under section 1465.8, and a \$150 conviction assessment under Government Code section 70737, subdivision (a)(1). Horne did not object to the restitution fine or court fees, nor did he say he was unable to pay them.

DISCUSSION

1. ***Substantial evidence supports the trial court's determination that, in holding his gun to the victim's head and then shooting into his car, Horne acted with independent objectives***

Horne contends the trial court should have stayed his sentence on count 3 (shooting at an occupied motor vehicle) under section 654 rather than running it consecutively to count 2 (assault with a semiautomatic firearm). Horne argues his actions from the time he pointed his gun at Taylor's head until he fired into Taylor's car constituted an indivisible course of conduct with "but one objective, to scare Taylor and get him to leave." The Attorney General disagrees, arguing Horne's "assault with a firearm and shooting at an occupied vehicle were committed by separate physical acts with multiple intents and objectives."

Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) " " "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor.' " " " (People v. Jackson (2016) 1 Cal.5th 269, 354 (Jackson).)

If the defendant harbored "multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations

share common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268.) But “ “[i]f all the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once.” ’ ” (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 129.) “ “The temporal proximity of the . . . offenses is insufficient by itself to establish that they were incident to a single objective.’ ” (*Jackson, supra*, 1 Cal.5th at p. 354.)

“The question of whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 [].) Its findings on this question must be upheld on appeal if there is any substantial evidence to support them.” (*People v. DeVaughn* (2014) 227 Cal.App.4th 1092, 1113; see also *People v. Braz* (1997) 57 Cal.App.4th 1, 10 (*Braz*).) “An appellate court views the evidence in a light most favorable to the respondent and presumes in support of the sentencing order the existence of every fact the trier could reasonably deduce from the evidence.” (*People v. Phung* (2018) 25 Cal.App.5th 741, 761 (*Phung*).)

Here, Taylor testified that Horne asked him and the group of men with whom he was standing, “Where’s the key to my truck?” Taylor tried to talk to Horne, explaining that he (Taylor) often drove that truck. Horne walked to the truck, got his gun, racked it, pointed the gun at Taylor, then put the gun to Taylor’s head. Taylor froze, then gave Horne the truck key. Horne told Taylor to drop his belongings and Taylor complied. Horne pushed Taylor’s head with the gun and told him to get in his car and “[g]et the fuck out of here.”

Taylor began to walk to his car and Horne started firing. Taylor told Horne “you ain’t got to do this,” because Horne now had the key. Horne kept firing. Two shots hit Taylor in the back. Taylor finally made it to his car and got inside. Horne followed him and fired three shots into the car with Taylor inside.

Horne argues his “intention from beginning to end was to force Taylor into his car and get him to drive away.” He says he “began shooting at Taylor because he was afraid, and continued shooting until he felt he was no longer in danger.” But that is Horne’s version of what happened. The jury implicitly rejected that version when it convicted Horne.

Moreover, “[a] defendant’s criminal objective should not be defined too broadly and amorphously.” (*Phung, supra*, 25 Cal.App.5th at p. 760, citing *People v. Perez* (1979) 23 Cal.3d 545 [rejecting defendant’s argument he had single objective in committing six sex offenses—to obtain sexual gratification].)

Substantial evidence supports a conclusion that Horne acted with at least two—and perhaps three—different objectives. First, he wanted Taylor to surrender the key to the truck, and he assaulted Taylor with his semiautomatic—putting the gun to Taylor’s head—to achieve that. Horne denied that the conversation with Taylor ever happened but the security guard corroborated Taylor’s testimony on this point. The guard testified he heard voices, then saw Horne and Taylor “interacting.” The security guard continued, “[a]nd [Horne] was demanding basically Larry to hand over the keys.”

After Horne had the keys and Taylor was walking toward his car, Horne began shooting at Taylor, striking him twice in the back. That conduct reflects an objective of seriously injuring or killing Taylor. If Horne wanted only for Taylor to get in his car and leave, he could have let him do just that. And—once Taylor got into his car—Horne fired three bullets into the car.

Again, this behavior suggests an objective of seriously injuring or killing Taylor, perhaps to punish him for taking the truck Horne seemed to consider his.

Horne cites two cases to support his section 654 argument. Both are distinguishable. In *People v. Kane* (1985) 165 Cal.App.3d 480 (*Kane*) the defendant Kane and the victim got into an argument that led to a fistfight. The victim got into his car to leave. As he began to drive off, Kane fired a gun at the victim's car, striking the car door. The victim backed up "to challenge" Kane, and Kane pointed a handgun at him. The victim crouched down and drove away. (*Id.* at p. 484.)

The jury convicted Kane of assault with a deadly weapon, discharging a firearm at an occupied motor vehicle, and possession of a firearm by a felon. (*Kane, supra*, 165 Cal.App.3d at p. 483.) On appeal, Kane contended the trial court should have stayed the punishment on the two latter crimes and the Attorney General conceded the error. (*Id.* at p. 488.)

In *Kane*, the victim already was in the car when Kane shot at him, and he remained in the car when Kane then pointed the gun at him. Here, by contrast, Horne pointed his gun at Taylor's head to get the truck key, then followed him to his car and fired repeatedly into the car. Whether Horne's objective when he shot into Taylor's car was to kill or injure him, or only to get him to leave the lot, that objective nevertheless is a different one from forcing Taylor to turn over the key.

Horne also cites *People v. Masters* (1987) 195 Cal.App.3d 1124 (*Masters*). That case arose from a gang-related shooting. Masters, riding in a car, saw another car with three people in it. Masters's buddy Lewis recognized the car and its driver as gang-affiliated. Masters pulled out a gun and fired several shots at the car, hitting one of the occupants. (*Id.* at p. 1127.)

The People charged Masters with the attempted murder of one victim, assault with a deadly weapon on a second victim, and discharging a firearm at an occupied motor vehicle in which all the victims were sitting. (*Masters, supra*, 195 Cal.App.3d at p. 1126.) In a plea deal, the prosecution amended the attempted murder charge to allege assault with a deadly weapon instead, and Masters pleaded to that count as well as the count for discharging a firearm at a motor vehicle. The court sentenced Masters to consecutive terms. (*Ibid.*)

On appeal, Masters argued section 654 prohibited the consecutive terms. The appellate court rejected that contention, reciting the rule: “The section 654 proscription against multiple punishment does not apply to violations arising from an indivisible course of conduct if during the course of that conduct the defendant committed crimes of violence against different victims.” (*Masters, supra*, 195 Cal.App.3d at p. 1127.) The court continued, “As long as each violent crime involves at least one different victim, section 654’s prohibition against multiple punishment is not applicable.” (*Id.* at p. 1128.) The court distinguished *Kane* on that ground. (*Id.* at p. 1130.)

In *Masters*, as in *Kane*, the assault with a firearm and the shooting at an occupied motor vehicle both took place while the victims were in the car. There was no evidence of independent objectives. In both *Masters* and *Kane*, the defendant’s sole objective was to kill or injure the occupants of the vehicle. Here, again, Horne put a gun to Taylor’s head to get the truck keys, then chased him, shooting at and hitting him, then fired more shots into his car, either to kill or injure him (the People’s theory) or to get him to leave the truck yard (Horne’s theory).

“The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained

multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639; see *Braz, supra*, 57 Cal.App.4th at pp. 9-12 [defendant who beat child then failed to summon medical aid for him properly punished for two counts of child endangerment; separate and distinct harm to child occurred when, after injury, he was left to suffer].) The trial court did not err in imposing consecutive terms.

2. *The section 12022.5, subdivision (a) firearm enhancement must be stricken on count 3*

As noted, the trial court imposed 16 months (as one-third the midterm of four years) on count 3, shooting at an occupied motor vehicle, for Horne’s personal use of a firearm in that offense. Horne contends that was error because firearm use is an element of the offense. The Attorney General agrees and so do we. We remand the case for the trial court to strike the firearm enhancement as to count 3.

3. *We remand for Senate Bill No. 620 consideration as well*

When it sentenced Horne, the trial court had no discretion to strike the firearm enhancement imposed on Count 2 under section 12022.5. (Former § 12022.5, subd. (c).) But Senate Bill No. 620, which took effect on January 1, 2018, gives trial courts authority to strike section 12022.5 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017-2018 Reg. Sess.) § 2.) In a supplemental brief, Horne contends we must remand his case to allow the trial court to exercise its discretion to strike the firearm enhancement. The Attorney General disagrees,

arguing “the record provides a ‘clear indication’ the court would not have stricken the firearm enhancement as to any count.”

“Although the court imposed a substantial sentence on [Horne], it expressed no intent to impose the maximum sentence.” (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 428.) Indeed, the prosecutor asked the trial court to sentence Horne to 25 years and 10 months in the state prison, but the court imposed a sentence of 19 years. The court chose the midterm on the firearm enhancement—not the upper term and not the low term. Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. Horne has a right to be present with counsel at that hearing. (See *People v. Rocha* (2019) 32 Cal.App.5th 352, 355, 360.) We express no opinion about how the court’s discretion should be exercised.

4. *We need not decide whether section 1001.36 is retroactive because Horne would not qualify for pretrial mental health diversion in any event*

While Horne’s appeal was pending, the Legislature enacted section 1001.36, which created a pretrial diversion program for certain defendants with mental disorders. The statute was effective June 27, 2018; the Legislature then amended it and the Governor approved it as amended as of September 30, 2018. (Sen. Bill No. 215 (2017-2018 Reg. Sess.)) In a second supplemental brief, Horne asserts he “is a good candidate for a diversion hearing” and so “a conditional remand is appropriate.” The Attorney General contends section 1001.36 is not retroactive.

Section 1001.36 authorizes a trial court to grant, for a period “no longer than two years,” “pretrial diversion,” defined as “the postponement of prosecution . . . at any point in the judicial process from the point at which the accused is charged until adjudication.” (§ 1001.36, subds. (c) & (c)(3).) To be eligible for

pretrial diversion, the defendant must meet six specific requirements. (§ 1001.36, subd. (b)(1).) The court “may require the defendant to make a prima facie showing that [he] will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion.” (§ 1001.36, subd. (b)(3).)

In *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), the Fourth District Court of Appeal held section 1001.36 to be retroactive. On December 27, 2018, our Supreme Court granted review on its own motion and denied a request for depublication. (*Frahs*, review granted on specified issues Dec. 27, 2018, S252220.) The Court designated the issues: “Does Penal Code section 1001.36 apply retroactively to all cases in which the judgment is not yet final? Did the court of appeal err by remanding for a determination under Penal Code section 1001.36?” (*Ibid.*) On May 23, 2019, the Fifth District Court of Appeal reached the opposite conclusion from *Frahs* in *People v. Craine* (2019) __ Cal.App.5th __ [247 Cal.Rptr.3d 564] (*Craine*).³

Given the facts of this case, we need not decide whether we agree with *Frahs* or *Craine* on the retroactivity issue. Among the many criteria that must be met before a trial court may grant pretrial diversion, the statute requires the court to be “satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community.” The court may consider—among other things—“the defendant’s violence and criminal history” and “the current

³ The Fifth District also held section 1001.36 not to be retroactive in an earlier unpublished case: *People v. Rocco* (Jan. 22, 2019, F074772) [nonpub. opn.]. On April 24, 2019, the Supreme Court issued a “grant and hold” order in that case. (*Ibid.*, review granted Apr. 24, 2019, S254264.)

charged offense.” (§ 1001.36, subd. (b)(1)(F).) Here, Horne pointed his loaded gun at the head of his co-worker, then chased him and shot him repeatedly, for no reason except the victim’s selection of a truck that Horne wanted to drive. Even if we were to find section 1001.36 retroactive to all cases not final on appeal, Horne plainly would be ineligible for relief.

5. *Horne has forfeited any challenge to the restitution fine and court fees*

Finally, Horne filed a third supplemental brief asserting we must remand for a hearing on his ability to pay the restitution fine and court fees, citing *Dueñas*, *supra*, 30 Cal.App.5th 1157. As noted, in the trial court Horne did not object to the assessments on the ground of an inability to pay. Section 1202.4, subdivision (d) allows a court to consider a defendant’s inability to pay if the restitution fine is more than the minimum fine of \$300. (*People v. Avila* (2009) 46 Cal.4th 680, 729; § 1202.4, subds. (b)(1) & (d).) Although Horne was sentenced before *Dueñas* was decided, he did not avail himself of this statutory remedy to challenge the imposition of the \$5,000 restitution fine. As the court imposed more than the minimum fine, Horne was obligated to object to the amount of the fine and demonstrate his inability to pay anything more than the \$300 minimum. That objection would not have been futile under governing law at the time of his sentencing hearing. (§ 1202.4, subds. (c) & (d); see also *Avila*, at p. 729.)

By failing to object that he lacked the ability to pay the \$5,000 restitution fine, Horne has forfeited his challenge to that fine and the much lower court operations and conviction assessments. Horne also has forfeited his contention that the court erred by failing to determine his ability to pay. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 [waiver doctrine applies

to claims involving the court’s failure to make or articulate discretionary sentencing choices].)⁴

DISPOSITION

Frank Earl Horne, Jr.’s sentence is vacated and the matter is remanded to the trial court (1) with instructions to strike the firearm enhancement as to count 3, and (2) for the court to exercise its discretion under Senate Bill No. 620. We otherwise affirm Horne’s conviction.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EGERTON, J.

We concur:

EDMON, P. J.

LAVIN, J.

⁴ Accordingly, we need not weigh in on the conflict among the cases decided after *Dueñas* addressing the forfeiture issue. (See, e.g., *People v. Castellano* (2019) 33 Cal.App.5th 485; *People v. Frandsen* (2019) 33 Cal.App.5th 1126; *People v. Bipialaka* (2019) 34 Cal.App.5th 455; *People v. Gutierrez* (June 4, 2019, D073103) __ Cal.App.5th __ [2019 WL 2373882].)